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No. 638

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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JULIUS HYMAN, *Petitioner,*

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, HELEN A. REGENSTEIN, BETTY R. HARTMAN AND JOSEPH REGENSTEIN, JR., CO-EXECUTORS OF THE ESTATE OF JOSEPH REGENSTEIN, DECEASED,

*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

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*Respondents.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

Julius Hyman, petitioner (plaintiff below), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered July 23, 1958, which affirmed a judgment of the United States District Court for the Southern District of Florida, dismissing this cause. Petition for rehearing was denied on November 21, 1958.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A-1-23) is reported at 258 F. 2d 502. A prior opinion on a prior appeal is reported at 222 F. 2d 545. (Appendix B, *infra*, pp. B-1-7).

## JURISDICTION

The judgment of the Court of Appeals was entered July 23, 1958 (Appendix C, *infra*, p. C-1) and petitioner's petition for rehearing was denied on November 21, 1958. (R. 2158) The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of *U. S.* v. *Throckmorton*, 98 U.S. 61, which permits a showing in later litigation of "extrinsic" fraud but forbids a showing of "intrinsic" fraud in obtaining a judgment in earlier litigation should be expressly repudiated and overruled by this Court, in view of the conflicts and uncertainties now existing in the lower federal courts. The key witness in the earlier proceedings, upon whose testimony the critical issue was decided, was guilty of vital perjury, and the pleadings and evidence in this case showed that the prior judgments were procured by intrinsic fraud, namely, vital perjury. The Court of Appeals disregarded completely this challenge and ruled that the prior judgments were conclusive; and this, even though the causes of action were admittedly different and the parties were admittedly different. In the section below, entitled "Reasons Relied on for Allowance of the Writ", citations illustrating the conflicts and uncertainties now existing in the lower federal courts are referred to. There is therefore presented to this Court an important and substantial question of federal law, of importance not only in this litigation but to future procedure in the federal courts.

2. Whether a litigant can take one position with respect to real parties in interest in one cause and reverse his position in a later cause; in the first cause claiming that

there was *no* privity between a closed corporation and the controlling shareholder of such corporation, and in the later cause, claiming there *was* privity between a closed corporation and the controlling shareholder of such closed corporation, and therefore, that the earlier cause was determinative of the later cause, even though the shareholder was not a party to the earlier cause. The Court of Appeals disregarded the holding of the Supreme Court of Colorado in the prior litigation that there was not privity between the corporation and the controlling shareholder, and upheld the respondents' complete change of position. This holding is in conflict with applicable decisions of this Court and other federal decisions; and has departed from the accepted and usual course of judicial proceedings by allowing the defendant to "blow hot and cold" in two different legal proceedings (*Davis* v. *Wakelee*, 156 U.S. 680, 689, and cases cited *infra*, p. 12).

3. Whether the decision of the Court of Appeals conflicts with the decisions of this Court in *Beardsley* v. *Beardsley*, 138 U. S. 262; *Southern Pacific Company* v. *Bogert*, 250 U. S. 483; and *Pepper* v. *Litton*, 308 U. S. 295. This proceeding was brought in equity, for an accounting and damages against a joint venturer and a fiduciary. The joint venturers (Hyman and Regenstein), had operated this business venture through the vehicle of a closed corporation. The prior litigation had been between Hyman and the vehicle, namely, Velsicol Corporation. The above cases establish the principle that although technical corporate procedures have been followed, such fact does not preclude an accounting and an establishment of an equitable trust between the "partners", or co-adventurers, in the closed corporation.

## STATEMENT OF THE CASE

Petitioner, Julius Hyman, filed suit against Joseph Regenstein* in the Circuit Court of Palm Beach County, Florida, seeking an accounting and damages, and alleging a joint venture, a fiduciary relationship between the parties, and fraudulent conduct by the defendant. (R. 20-46) The defendant obtained removal of the cause to the United States District Court for the Southern District of Florida on the ground of diversity of citizenship (28 U.S.C. 1441), the matter in controversy involving $20,000,000. (28 U.S.C. 1332). (Appendix A, p. A-1).

Defendant moved for a summary judgment on the ground of *res judicata*. The motion was granted. On appeal, the Court of Appeals reversed and remanded the case for trial (222 F. 2d 545). (Appendix B, p. B-6).

On remand, the case was tried before a district judge, without a jury, who found for the defendant and dismissed the cause. There was no opinion; only findings of fact and conclusions of law. (R. 2013-2023) The Court of Appeals affirmed, and the three questions of law presented by this petition for writ of certiorari arise out of that decision.

The record is voluminous, and no facts will be stated which are not material to the three questions presented to this Court.

(1) *The facts with respect to the first question:*

Hyman and Regenstein were first cousins. In the fall of 1930, Hyman, a research chemist with degrees from the

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* Joseph Regenstein died while the cause was pending in the Court of Appeals, and his executors were substituted pursuant to notice and order. (R. 2106)

University of Chicago (B.S.) and the University of Leipzig (Ph.D.), then twenty-nine years old, conceived two inventions in the petroleum field which he believed important enough for commercial development. He discussed this possibility with his cousin, Regenstein, then forty-one years of age, the president and controlling owner of two large manufacturing companies which he had inherited. (R. 122, 126, 130, 124, 134)

The cousins agreed to go into business together: Regenstein to furnish the cash working capital for a four-fifths interest, and Hyman to turn his two inventions into the enterprise for a one-fifth interest. Regenstein insisted that the enterprise be carried on through the vehicle of a corporation, and a corporation was formed for this purpose (Velsicol Corporation). (R. 230, 231, 1033).

At the organization meeting, held in January 1931 in the office of Regenstein's personal attorney, the occurrence giving rise to the first question presented by this petition took place. Regenstein's attorney had prepared an instrument by which Hyman, if he executed it, agreed to assign to the corporation all of his *future* inventions. (R. 1036). There was another undisputed instrument by which Hyman assigned the two existing inventions and patent applications to the corporation to carry out the object of the new venture. This instrument was executed by Hyman for his one-fifth interest. (R. 1683).

The controversy between the cousins arose out of the claim that Hyman signed an agreement to assign all future inventions; and Velsicol Corporation brought suit against him in Illinois in 1946, to perform specifically the alleged agreement to assign future inventions. (Appendix A, p. A-7; R. 35, 66). Hyman denied execution of the agreement and the alleged instrument has never been produced. (Appendix A, p. A-4).

The Supreme Court of Illinois (*Velsicol Corporation* v. *Hyman*, 405 Ill. 352; 90 N.E. 2d 717), reversing the Appellate Court of Illinois (338 Ill. App. 52; 87 N.E. 2d 35), held that Hyman did sign the agreement to assign future inventions, and rested its finding on the testimony of a witness (Schneider), 405 Ill. 352, 360, 366). The Chancellor in the lower court also rested his finding on the testimony of Schneider on the ground that he was a disinterested witness whose later discovered perjury—discovered after all litigation prior to this proceeding had terminated—has been disregarded in this cause by the Court of Appeals, which held the prior finding to be binding on Hyman. (Appendix A, p. A-16). Neither the District Court nor the Court of Appeals made any finding as to whether Hyman signed the alleged unproduced instrument. (Appendix A; R. 2013)

The proof that Schneider was a perjurer was that in April 1953, almost a year after all litigation, other than this proceeding, had terminated, Schneider admitted to Hyman (R. 1773) and to another witness (R. 1860) who testified at the trial in this cause that he heard and saw the occurrence in Regenstein's attorney's office in January 1931, when the attorney presented the agreement by which Hyman was to agree to assign all *future* inventions, and that Hyman had refused to sign the document. In the earlier trials, and in a deposition taken earlier in this cause, Schneider had repeatedly denied this occurrence. (R. 1705)

Schneider, a life-long business associate of Regenstein, was not called to the stand at the trial in this case nor his absence in any way explained.

Hyman's testimony that he refused to sign the instrument was corroborated by another witness present at the meeting in the attorney's office, Degginger, a director of

Velsicol Corporation and a vice president of one of Regenstein's other companies. (R. 746)

(2) *The facts with respect to the second question:*

The Court of Appeals held that there was "privity" between Velsicol Corporation and the defendant Regenstein and on that holding, ruled that the judgments in the earlier suits collaterally estopped Hyman in this cause (Appendix A, p. A-17). The Court of Appeals admitted that *res judicata*, as such, was not applicable, for there was no identity of parties nor of causes of action. (Appendix A, p. A-12).

All of the earlier lawsuits were between Velsicol Corporation and Hyman. Regenstein was not a party. (Appendix A, p. A-17).

All of the earlier lawsuits involved different causes of action from the action here by Hyman against Regenstein for an accounting (Appendix A, p. A-12). But the essential fact with respect to the second question is that, up until this lawsuit, Regenstein and his attorneys had always taken the position that he was not in privity with Velsicol Corporation, and this contention was sustained by the Supreme Court of Colorado (*Julius Hyman & Co., et al.* v. *Velsicol Corporation*, 123 Colo. 563, 615; 233 P. (2d) 977, 1004).

(3) *The facts with respect to the third question:*

The Court of Appeals held that an *express contract* of joint venture was not proved and that the relationship and actions of the parties were not enough to establish a basis for liability (Appendix A, p. A-19).

It commented that Hyman was a mere employee and minority shareholder (Appendix A, p. A-21).

The facts are that Hyman and Regenstein decided to

go into business together; that the enterprise began nearly two months before the corporate vehicle for the two cousins' venture was adopted. It was *their* venture from the start and remained so to the end. Schneider, Regenstein's witness, testified (R. 1710):

> "Q. Were formal meetings of the shareholders and of the directors held?
>
> A. No, they weren't.
>
> Q. How was the official business of the corporation carried on?
>
> A. There were, I would say, daily meetings between Julius [Hyman] and Joe [Regenstein] since they were the only two stockholders involved where they made all the decisions."

The two cousins ran the business alone, although a board of five directors had been provided for in the formal corporate organization. Soon after Hyman left the venture because Regenstein had broken his promise to increase Hyman's participation in Velsicol Corporation, Regenstein brought about a recapitalization of Velsicol Corporation which reduced Hyman's corporate interest from 20% to less than 1%. (Appendix A, p. A-7)

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. Exactly fifty years ago, an editor of the Harvard Law Review (22 Harv. L. Rev. 49) invited attention to the conflict between *U. S.* v. *Throckmorton* (98 U.S. 61) and *Marshall* v. *Holmes* (141 U.S. 589). Fifteen years ago, this Court had occasion to review those two decisions in a case involving "extrinsic fraud" (*Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238). The *Hazel-Atlas* case involved extrinsic fraud and there was not presented for decision the question of whether intrinsic fraud (perjury) could be proved

in a later equity proceeding which challenged the effectiveness of the prior judgment.

Here, we have intrinsic fraud—see above, Question 1, and (1) The Facts with Respect to the First Question.

Shortly after the decision in *Marshall* v. *Holmes*, a federal circuit court certified to this Court a request for instructions with respect to whether *U. S.* v. *Throckmorton* had been overruled by *Marshall* v. *Holmes*. This Court held that it would not rule on the question because a final decree had not been brought before it (*Graver* v. *Fairot*, 162 U. S. 435).

And so the conflicts and uncertainties have continued in the federal courts up to the present day. (*Publicker* v. *Shallcross*, 106 F. 2d 949, C.A. 3rd, 1939; *Griffith* v. *Bank of New York*, 147 F. 2d 899, C. A. 2d 1945; *Dowdy* v. *Hawfield*, 189 F. 2d 637, Ct. App. D.C. 1951.)

These conflicts and uncertainties have been the subject of repeated discussions in the lower federal courts and by leading legal writers. (*Dictograph Products Co.* v. *Sonotone*, 230 F. 2d, 131, 137, C. A. 2d, 1956, Opinion by Judge L. Hand; 22 Harv. L. Rev. 49; 49 Harv. L. Rev. 327; 21 Col. L. Rev. 268; 55 Yale L. Journal 623, 659; 23 Calif. L. Rev. 79, 84; 4 Vanderbilt L. Rev. 338; Moore's Federal Practice, Vol. 3, § 60.03, p. 3269, 1938 ed.)

In a recent case in the Supreme Court of New Jersey (*Shammas* v. *Shammas*, 9 N.J. 321, 88 Atl. 2d 204, 1952) in an exhaustive opinion by Brennan, J. (now an Associate Justice of this Court), the conflict and uncertainty are discussed fully and the fact adverted to that the *Hazel-Atlas* decision left the problem open. Justice Brennan, after a review of the authorities, concluded:

> "• • • we agree that it is a 'journey into futility to attempt a distinction between extrinsic and intrinsic

matter.' *Moore* v. *Rogers, Federal Relief from Civil Judgments* (55 Yale Law Journal, 623 at 658).

"• • • the spectacle of the machinery of the law bearing down mercilessly, and perhaps ruinously, to collect and deliver over the fruits of undoubted fraud (is) peculiarly odious.' 126 A.L.R. 393. Plainly, the encouragement of vexatious litigation is the lesser evil. We prefer to follow the equity of the matter than to take away an unjust judgment obtained by vital perjury when the injustice and inequity of allowing it to stand are made evident."

In the *American Law Institute* (Restatement of Judgments—sec. 118 b., p. 512), the distinction between extrinsic and intrinsic fraud is criticized and the use of the terms rejected.

The English Courts have never drawn the distinction between extrinsic and intrinsic fraud, and hold that equity has full power to interpose and refuse to allow a successful litigant to obtain the fruits of his fraud perpetrated in a former action. (*Abouloff* v. *Oppenheimer & Co.*, 15 Q.B.D., 295, C. A. 1882; *Flower* v. *Lloyd*, 10 Ch.D. 327, C. A. 1879.)

This petition thus presents a substantial and important question of federal law which has arisen not only in this case but has been for at least sixty years (Cf. *Graver* v. *Fairot*, 162 U.S. 435) a subject of uncertainty and conflict.

We have here a final decree and we have pleadings and evidence which directly present the issue of whether intrinsic fraud, namely, the vital perjury of the critical witness in the earlier litigation, is to be considered and ruled upon. The Court of Appeals has chosen to disregard this issue and has held that the prior decisions conclusively estopped the petitioner in this proceeding.

We most respectfully urge that this is an appropriate cause for this Court to exercise its discretion by allowing

the writ, in order to rule upon such an important and controversial problem, which will continue to arise in the lower federal courts until it has been resolved by this Court.

The Court of Appeals for the Third ~~District~~ Circuit made this comment in *Publicker* v. *Shallcross, supra:*

> "In our judgment, and if the cause arises, the harsh rule of *U. S.* v. *Throckmorton,* above cited, will be modified in accordance with the more salutary doctrine of *Marshall* v. *Holmes,* above cited. We believe truth is more important than the trouble it takes to get it."

2. The Court of Appeals held there was "privity" between Regenstein and Velsicol Corporation and on that ground, held that Hyman was collaterally estopped by the judgments in the cases between Hyman and Velsicol Corporation, although Regenstein was not a party to those proceedings. (Appendix A, p. A-17).

In the earlier proceedings, Hyman had repeatedly asserted Velsicol Corporation and Regenstein's intermediary corporations were the *alter ego* of Regenstein, and attempted to attach to Velsicol Corporation the promises and actions of Regenstein. Regenstein and his attorneys denied any such relationship and contended that any complaint Hyman had against Regenstein had to be obtained in a separate and different cause of action against Regenstein personally. Regenstein and his attorneys prevailed in this contention and the Supreme Court of Colorado expressly adopted their position. It said:

> "Assuming that Joseph Regenstein had definitely agreed with Dr. Hyman to increase his participation in plaintiff, and assuming this was based upon a valid consideration, Dr. Hyman's complaint should be addressed to Joseph Regenstein, and any relief to which he was entitled must be from Regenstein and not from Velsicol." (123 Colo. 563, 615; 233 P. 2d 977, 1004).

The holding of the Court of Appeals in this case is therefore directly in conflict with *Davis* v. *Wakelee*, 156 U.S. 680, and many decisions of the Courts of Appeals which have followed the principle of *Davis* v. *Wakelee*. For example, *Eads Hide and Wool Co.* v. *Merrill*, 252 F. 2d 80, 84 (C.A. 10th, 1958); *Wilson* v. *Union Light & Power Co.*, 59 F. 2d 580 (C.A. 8th, 1932); *Stentor Elec. Mfg. Co.* v. *Klaxon*, 115 F. 2d 268 (C.A. 3rd, 1940).

In *Davis* v. *Wakelee*, Mr. Justice Brown said (p. 689):

> "It may be laid down as a general proposition that, where a party assumes a certain legal position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who acquiesced in the position formerly taken by him."

*Certiorari* should be granted in order to review and correct the decision of the Court of Appeals in direct conflict with *Davis* v. *Wakelee* and decisions of other United States Courts of Appeal.

3. The Court of Appeals held that an express contract of joint venture was not proved, and concluded: "The sine qua non of joint venture is a contract purposefully entered into by the parties. It is not a status imposed by law but is a relationship voluntarily assumed and arising wholly ex contractu". (Appendix A, p. A-19).

This holding, it is respectfully submitted, is in direct conflict with such decisions of this Court as *Beardsley* v. *Beardsley*, 138 U.S. 262; *Southern Pacific Company* v. *Bogert*, 250 U.S. 483; and *Pepper* v. *Litton*, 308 U.S. 295.

Apparently the thought of the Court of Appeals was that if a corporation was used as a vehicle for the operation of an enterprise, this resulted only in an arm's length

relationship of shareholder to shareholder. *Beardsley* v. *Beardsley* held that even though proper corporate techniques had been employed between two brothers in a railroad enterprise, which they owned, nevertheless the relationship as between them — as distinguished from the relationship to third parties—persisted, and the majority brother could not deal inequitably with the minority brother.

A very recent case in the Supreme Court of Maryland is also exactly in point. *DeBoy* v. *Harris*, 207 Md. 212; 113A. 2d 903 (1955), commented on in 16 Maryland L. Rev. 348; 44 Cal. L. Rev. 590. See also, "The Close Corporation," 52 Northwestern Univ. L. Rev. 345 (1957).

The Court of Appeals also held that the prior cases and particularly the recapitalization case (*Hyman* v. *Velsicol Corp.*, 342 Ill. App. 489; 97 N.E. 2d 122) were determinative in this proceeding. This holding in contrary to *Southern Pacific Company* v. *Bogert*. This Court, speaking through Mr. Justice Brandeis, said;

> "The minority stockholders do not complain of a wrong done the corporation, or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific, and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right by declaring the trust on which the Southern Pacific holds it, and ordering distribution or compensation."

Further, the Court said:

> ". . . And there is no basis for estoppel by election; nor any reason why the minority who failed in the attempt to recover on one theory, because unsupported

by the facts, should not be permitted to recover on another, for which the facts afford an adequate basis."

In other words, if the cause of action were different, as is admittedly so here (Appendix A, p. A-12), prior proceedings are not a bar.

The underlying principle that a following of correct corporate techniques will not foreclose equitable relief is well illustrated by *Pepper* v. *Litton*, 308 U.S. 295, in which Mr. Justice Douglas said:

> "No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered it was the duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it. Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart."

## CONCLUSION

We have presented only questions which we believe are encompassed by Rule 19(b) of this Court. We believe them to be of importance not only in this cause but of substantial importance to future proceedings in the federal courts.

It is respectfully submitted that this petition for a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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January, 1959.